

Voluntary Departure

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I. Background Information

A. Purpose

1. Voluntary Departure permits an alien to leave the U.S. voluntarily and “at the alien’s own expense” without a formal order of removal. It is issued in lieu of an order of removal.¹
2. Subsequent return to the U.S. may be easier with a voluntary departure order.

B. Applicable Law

1. INA § 240(B)
2. 8 C.F.R. § 1240.26
3. Case Law

II. Types of Voluntary Departure

A. Before the DHS

1. An alien may seek voluntary departure from the U.S. in lieu of being placed in removal proceedings. This is alternatively referred to as “voluntary return.” 8 C.F.R. 240.25.

B. Pre-Conclusion

1. INA § 240B(a)
2. Requirements
 - a) Must request before or at the Master Calendar hearing
→ *Matter of Cordova*, 22 I&N Dec. 966 (BIA 1999).
 - b) Must concede removability
 - c) Cannot apply for other relief and must waive appeal of all issues
→ The waiver must be express, knowing, and intelligent. A “constructive waiver” will not suffice. *Matter of Ocampo*, 22 I&N Dec. 1301 (BIA 2000).
 - d) No minimum presence required
 - e) No need to show means and intent to Depart
 - f) Arriving aliens are not eligible
3. Terms, if granted
 - a) 120 days maximum
 - b) No Bond

¹ The voluntary departure order contains an alternative order, that if the respondent fails to voluntarily depart under the conditions imposed, he is ordered removed.

C. Post-Conclusion

1. INA § 240B(b)
2. Requirements
 - a) May request at any time before conclusion
 - b) Need not waive appeal, but cannot appeal amount of time granted
 - c) One-year physical presence required
→ Preceding the service of the NTA
 - d) Good moral character for at least five years
 - e) Must show means and intent to Depart²
3. Terms, if granted
 - a) 60 days maximum
 - b) \$500 minimum bond

III. Bars to Eligibility for Pre- or Post-Conclusion Voluntary Departure

A. Prior Grant of Voluntary Departure

1. A respondent is ineligible if he or she has been granted voluntary departure after being found inadmissible under INA § 212(a)(6)(A). INA § 240B(c).

B. Removable under INA § 237(a)(4)

1. Security and related grounds, including terrorist activity
2. INA § 240(a)(1)

C. Convicted of an Aggravated Felony

1. INA § 240(a)(1)

IV. Discretion

A. Element for both pre- and post-conclusion VD

B. *Matter of Arguelle-Campos*, 22 I&N Dec. 811 (BIA 1999)

1. Factors to be considered:
 - a) Nature and underlying circumstances of the removal grounds at issue
 - b) Additional violations of the immigration laws
 - c) The existence, seriousness, and recency of any criminal record
 - d) Other evidence of bad character or the undesirability of the applicant as a LPR

² See 8 C.F.R. § 1240.26(b)(1)(c)(iv). (((In practice, these requirements are generally found to be met based on testimony alone.)))

- e) Length of residence
- f) Family ties in the U.S.
- g) Humanitarian needs

V. Fines, Bonds, & Conditions

A. Fines

1. The Immigration Judge sets a fine for failure to depart with both pre- and post-conclusion VD.
2. There is a rebuttable presumption that the amount will be \$3,000. 8 C.F.R. § 1240.26(j).

B. Bond

1. Not mandatory for pre-conclusion VD
2. Mandatory for post-conclusion VD
 - a) It must be an amount necessary to ensure that the alien departs within the time specified but cannot be less than \$500. 8 C.F.R. § 1240.26(c)(3)(i).

C. Conditions

1. The Immigration Judge may impose conditions if he or she “deems [them] necessary to ensure the alien’s timely departure from the [U.S.]” 8 C.F.R. §§ 1240.26(b)(3)(i), (c)(3).
2. The Immigration Judge should advise the respondent of the conditions before granting VD.
3. Case Law:
 - a) *Matter of M-A-S-*, 24 I&N Dec. 762 (BIA 2009): The Immigration Judge may order continued detention of the respondent until his or her VD or give permission to voluntarily depart “under safeguards.”

→ “Under safeguards” = requirement that the alien remain in custody until he or she departs the U.S.

VI. Other Requirements

A. Travel Documents

1. Generally, the respondent must provide a passport or other travel documentation sufficient to assure the lawful entry into the country to which the respondent is departing. 8 C.F.R. §§ 1240.26(b)(3)(i), (c)(2).³

³ (((Alternatively, the DHS may state on the record whether or not a valid, unexpired travel document for the respondent is known to exist, or the respondent may testify regarding his ability to timely obtain a valid travel document.)))

B. Advisals

1. Types of Advisals

a) ~~Regarding~~ Potential Eligibility for Relief

→ Case Law:

(a) *Matter of Cordova*, 22 I&N Dec. 966, 970 n.4 (BIA 1999).

(b) 8 C.F.R. § 1240.11(a)(2)

→ Special Considerations

(c) If the respondent is not eligible for pre-conclusion VD, the Immigration Judge must nevertheless consider whether the respondent is eligible for post-conclusion VD. *See Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012).

b) Requirements and Consequences

→ Consequences

(a) Alternative order of removal will automatically take effect if the respondent fails to depart within time specified.

(b) An alien who fails to depart within the time specified becomes subject to a civil penalty between \$1,000 and \$5,000.

(c) The alien will be ineligible for all forms of discretionary relief for 10 years after the date the alien was supposed to depart. INA § 240B(d)(1)(B).

(i) Note: If VD was granted in 1995 or earlier, the automatic bar is 5 years, instead of 10.

→ Bond (Only required for post-conclusion VD)

(d) Amount to be posted

(e) Duty to post within 5 days of the IJ's order

(f) Consequences of failing to timely post bond: VD order is vacated and the alternative order of removal takes effect. 8 C.F.R. § 1240.26(c)(3).

(g) That if an appeal is filed, proof must be given to the BIA within thirty days of filing appeal that bond was timely paid, otherwise the BIA will not reinstate the VD order.

→ Motions

- (h) If the respondent files a Motion to Reopen or a Motion to Reconsider within the VD time period, the VD grant automatically terminates and the removal order takes effect immediately. 8 C.F.R. §§ 1240.26(c)(3)(iii), (e)(1).

2. Basic Requirements

a) Timing of Advisals

- The Immigration should give the advisals both before the respondent has had the opportunity to request VD and at the time VD is granted.
- The BIA should give the advisals when reinstating a VD order on appeal.

b) Advisals may be given orally or in writing.⁴

3. Importance of Advisals

- a) *Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010): “Where the Immigration Judge did not provide all the advisals that are required upon granting voluntary departure and the respondent failed to submit timely proof to the Board that a voluntary departure bond had been posted, the record was remanded for the Immigration Judge to grant a new period of voluntary departure and to provide the required advisals.”

⁴ Most courts have templates of the wording for the advisals, or they are available in the OCIJ Bench Book.

VOLUNTARY DEPARTURE CHEAT SHEET – REMOVAL PROCEEDINGS

(See INA § 240B; 8 CFR § 1240.26)

| | 240B(a) VD (up to 120 days) | 240B(b) VD (up to 60 days) |
|---|--|--|
| MAXIMUM PERIOD | 120 days (usually 30-45 days if detained) | 60 days |
| ARRIVING ALIENS/PHYSICAL PRESENCE BAR? | R may not be an arriving alien (but there is no required period of physical presence). | R must have been physically present in the U.S. for at least one year immediately preceding service of the NTA (potentially may include some arriving aliens). |
| TIMING OF REQUEST | R must make request for VD prior to or at master calendar hearing at which case is initially scheduled for a merits hearing. | R may make request up until conclusion of proceedings. |
| STAGE OF PROCEEDINGS | Proceedings must not have progressed beyond 30 days after the master calendar hearing at which the case was initially scheduled for a merits hearing. | R may make request up until conclusion of proceedings. |
| PLEADING AND APPEAL REQUIREMENTS | R must concede removability, must forego all additional requests for relief, and must waive appeal of all issues. | R may contest removability, litigate additional requests for relief, and reserve appeal on all issues. |
| DEPARTURE AT OWN EXPENSE | Not necessarily. <i>See Matter of Arguelles-Campos</i> , 22 I&N Dec. 811, 817 (BIA 1999); INA § 241(e)(3)(C). | 8 CFR § 1240.26(c)(1)(iv) requires R to prove that he has the means and intent to depart immediately by clear and convincing evidence. <i>But see</i> INA § 241(e)(3)(C) for an exception. |
| TRAVEL DOCUMENT | R must present a valid travel document (unless DHS already has R's travel document, or travel document is not required by country to which departing). IJ's order may provide for presentation of travel document to DHS within no more than 60 days. | R must present valid travel document for inspection by the DHS <i>before</i> VD is granted. |
| BOND/OTHER CONDITIONS | IJ, in her discretion, may impose a bond. R also must satisfy any other conditions that the IJ imposes to ensure timely departure. <i>See Matter of M-A-S-</i> , 24 I&N Dec. 762 (BIA 2009) (IJ may impose requirement that detained R depart under safeguards). | IJ must impose a VD bond of at least \$500, to be paid within 5 business days of entry of VD order. R also must satisfy any other conditions that IJ imposes to ensure timely departure. (No bond required for detained R required to depart under safeguards. <i>Matter of M-A-S-</i> , 24 I&N Dec. 762 (BIA 2009)) |
| DISCRETION | R must merit a favorable exercise of discretion. <i>See Matter of Arguelles-Campos</i> , 22 I&N Dec. 811, 817 (BIA 1999) (citing <i>Matter of Gamboa</i> , 14 I&N Dec. 244, 248 (BIA 1972)). | R must merit a favorable exercise of discretion. <i>See Matter of Arguelles-Campos</i> , 22 I&N Dec. 811, 817 (BIA 1999) (citing <i>Matter of Gamboa</i> , 14 I&N Dec. 244, 248 (BIA 1972)). |
| AGGRAVATED FELONY BAR | R is barred if removable per INA § 237(a)(2)(A)(iii) (aggravated felony). | R is barred if removable per INA § 237(a)(2)(A)(iii) (aggravated felony). |
| SECURITY BAR | R is barred if removable per INA § 237(a)(4) (security and related grounds) (regs contain more inclusive bar than statute). | R is barred if removable per INA § 237(a)(4) (security and related grounds). |
| GMC BAR? | No express GMC requirement (but GMC issues may be relevant to discretion). | R must demonstrate GMC for at least five years immediately preceding the VD application. |
| PREVIOUS VD BAR | R is barred if previously afforded VD in removal proceedings after having been found inadmissible per INA § 212(a)(6)(A). | R is barred if previously afforded VD in removal proceedings after having been found inadmissible per INA § 212(a)(6)(A). |
| BY STIPULATION? | Yes, generally for purposes of overcoming problems with timing of request or stage of proceedings. | No. |

NOTICE TO RESPONDENTS
GRANTED VOLUNTARY DEPARTURE

NAME: _____ A# _____

You have been granted the privilege of voluntarily departing from the United States of America, The Court advises you that, if you fail to voluntarily depart the United States within the time period specified, a removal order will be automatically entered against you. Pursuant to section 240B(d) of the Immigration and Nationality Act, you will also be subject to following penalties:

1. You will be subject to a civil penalty of not less than \$1,000 and not more than \$5,000; and
2. You will be ineligible, for a period of 10 years, to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change of nonimmigrant status.

The Court further advises you that:

You have been granted pre-conclusion voluntary departure.

1. If you file a motion to reopen or reconsider during the voluntary departure period, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply. 8 CFR § 1240.26(b)(3)(iii).
2. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of \$3,000 (or _____ instead of the presumptive amount). 8 CFR § 1240.26(j).

You have been granted post-conclusion voluntary departure.

1. If the Court set any additional conditions, you were advised of them, and were given an opportunity to accept or decline them. As you have accepted them, you must comply with the additional conditions. 8 C.F.R. § 1240.26(c)(3).
2. The Court set a specific bond amount. You were advised of the bond amount, and were given an opportunity to accept or decline it. As you have accepted it, you have a duty to post that bond with the Department of Homeland Security, Immigration and Customs Enforcement, Field Office Director within 5 business days of the Court's order granting voluntary departure. 8 C.F.R. § 1240.26(c)(3)(i).
3. If you have reserved your right to appeal, then you have the absolute right to appeal the decision. If you do appeal, you must provide to the Board of Immigration Appeals, within 30 days of filing an appeal, sufficient proof of having posted the voluntary departure bond. The Board will not reinstate the voluntary departure period in its final order if you do not submit timely proof to the Board that the voluntary departure bond has been posted. 8 CFR § 1240.26(c)(3)(ii).
4. If you do not appeal and instead file a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled, or extended, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply. 8 C.F.R. §§1240.26(c)(3)(iii), (e)(1).
5. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of \$3,000 (or _____ instead of the presumptive amount). 8 C.F.R. § 1240.26(j).

**NOTICE TO RESPONDENTS
GRANTED VOLUNTARY DEPARTURE**

NAME: _____ A# _____

You have been granted the privilege of voluntarily departing from the United States of America. The Court advises you that, if you fail to voluntarily depart the United States within the time period specified, a removal order will be automatically entered against you. Pursuant to section 240B(d) of the Immigration and Nationality Act, you will also be subject to following penalties:

1. You will be subject to a civil penalty of not less than \$1,000 and not more than \$5,000; and
2. You will be ineligible, for a period of 10 years, to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change of nonimmigrant status.

The Court further advises you that:

You have been granted pre-conclusion voluntary departure under safeguards.

1. If you file a motion to reopen or reconsider during the voluntary departure period, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply. 8 CFR § 1240.26(b)(3)(iii).
2. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of \$3,000 (or _____ instead of the presumptive amount). 8 CFR § 1240.26(j).

You have been granted post-conclusion voluntary departure under safeguards.

1. If the Court set any additional conditions, you were advised of them, and were given an opportunity to accept or decline them. As you have accepted them, you must comply with the additional conditions. 8 C.F.R. § 1240.26(c)(3).
2. The Court did not set a specific bond amount, but has granted voluntary departure under safeguards. *See Matter of M-A-S-*, 24 I&N Dec. 762 (BIA 2009).
3. If you have reserved your right to appeal, then you have the absolute right to appeal the decision.
4. If you do not appeal and instead file a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled, or extended, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply. 8 C.F.R. §§1240.26(c)(3)(iii), (e)(1).
5. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of \$3,000. 8 C.F.R. § 1240.26(j).

Voluntary Departure Scenarios

1. Respondent arrived in the United States in June 2017. She is accompanied by her two minor children. All three are issued NTAs and placed into proceedings. They assert a gang based asylum claim, which you deny following a hearing in February 2018. At the conclusion of the hearing you are inclined to grant the family post-conclusion voluntary departure. Are you able to do that?
2. Respondent is detained. He has been convicted of stealing \$22,000 from his employer. Respondent is charged with having entered without inspection. He appears at a master calendar hearing and requests pre-conclusion voluntary departure. Can you grant that request?
3. Respondent has been in proceedings for three years. At a master calendar two years ago, you scheduled the merit hearing and set a filing deadline. Respondent asserts a claim for Non-LPR Cancellation. On the date of the merit hearing, Respondent appeared with counsel and indicated that the qualifying relative—a child—had recently turned 22. Consequently, they request to withdraw with prejudice the 42B application and request 120 days pre-conclusion voluntary departure. The government does not object. Are you able to grant the request if you are otherwise inclined to?
4. Same facts as in number 3 with one modification. In the event that the government objects to the request for pre-conclusion voluntary departure, can you grant the request over the government's objection?
5. You are hearing a Non-LPR cancellation case. During the hearing, Respondent testifies that if his application is denied he is requesting post-conclusion voluntary departure. He testifies that he has a valid unexpired passport, \$2500 in cash to buy a ticket and agrees to leave the United States within the time provided by the Court. Respondent has no criminal record. Is he eligible for post-conclusion voluntary departure?
6. Respondent is detained. She is charged as an arriving alien. She appears pro se at an initial master calendar, admits the allegations, concedes removability, and designates Romania as the country of removal. She has no criminal record and requests no relief. She says to you "I am only asking for voluntary departure." Can you grant her request?
7. Respondent is on your non-detained docket. He is charged as an EWI. At the initial master, respondent appears with counsel and admits the allegations, concedes removability, and designates a country of removal. Counsel identifies no relief and requests 30 days pre-conclusion voluntary departure. Counsel tells you that Respondent has a consular interview overseas in three weeks and already has an airplane ticket purchased. The government objects and tells you that Respondent was previously in proceedings in Texas charged as

having entered without inspection and was granted voluntary departure by an IJ in Houston three years ago. Can you grant pre-conclusion voluntary departure?

8. Respondent is before you at a master calendar and requests pre-conclusion voluntary departure. Removability has been established. DHS objects and gives you the I-213 which reflects that Respondent has been given four prior voluntary returns by Customs and Border Patrol agents in the last three years. Is the Respondent eligible for pre-conclusion voluntary departure? Is this a discretionary factor?
9. During a merit hearing, Respondent requests voluntary departure in conjunction with an adverse ruling on the merits of his application. You learned during the hearing that Respondent has pending criminal charges for Domestic Violence Family Battery. He is out on bond awaiting trial on the criminal case. DHS “defers to your judgment” on the voluntary departure issue. May you consider the pending criminal charge in evaluating the request?
10. Respondent was before you three years ago. You granted their request for voluntary departure and set a departure date. Respondent did not leave the United States. Respondent has now filed a Motion to Reopen stating that they are now the beneficiary of an Approved I-130 filed by a recent spouse and want to adjust their status. Is the Respondent eligible for adjustment of status?